No. 79 - 335

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SHELL OIL COMPANY, AMOCO PRODUCTION COMPANY, and NORTHERN MICHIGAN EXPLORATION COMPANY,
Petitioners,

v.

WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC., et al.,
Respondents.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE U. S. SUPREME COURT

Roger L. Conner
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Washington, D. C. 20036

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STATUTES AND OTHER AUTHORITIES:

QUESTION PRESENTED

This case involves no substantial federal question and raises exclusively state law issues, decided against petitioners after full opportunity for hearing and trial.

STATEMENT OF THE CASE

The Pigeon River Country State Forest is the largest continuous tract of state-owned land in the lower peninsula of Michigan. It provides habitat for bear, bobcat, coyote and the only remaining wild elk herd east of the Mississippi River (R 230-236).[1] Following a period of extensive oil and gas leasing of both state and private land throughout northern lower Michigan, most of which was not controversial, a number of citizens and citizen groups urged that permits to drill (required under state law) be denied for the small fraction of the leased area comprising the Pigeon River Country. Numerous issues of state law were raised at various times, including the interpretation of leases, permit requirements, the state law governing oil and gas development, and the Michigan Environmental Protection Act.

This suit was filed under the Michigan Environmental Protection Act (MEPA), (Mich. Stat. Ann. § 14.528 (201) et seq.), against the State alleging that issuance of permits to drill would violate the Act. Oil Company leaseholders intervened as defendants. Unlike the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., which is principally procedural, MEPA establishes a state substantive law of environmental protection.[2] The Act, tracking the language of the Michigan Constitution, prohibits activities likely to result in "pollution, impairment or destruction to the air, water or other natural resources of the state" unless there are "no feasible and prudent

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[1] "R" refers to pages of the Appellants' Appendix on Appeal to the Michigan Supreme Court. "T" refers to pages of the trial transcript.

[2] Petitioners' analogy to NEPA at Page 12 of their Petition reveals a fundamental misconception about MEPA. MEPA has no separate procedural requirements. For example, environmental impact statements are required in Michigan by Executive Order, not by the Act. Paragraph 16 of the Complaint is based on Section 5 which requires agencies to make a "determination" of environmental impacts. The same Section continues that courts must make a de novo review of that finding, taking additional evidence if necessary, and enjoin any conduct which violates the Act. Mich. Stat. Ann. § 14.528(205).

alternatives." (Mich. Stat. Ann. § 14.528 (201). Ray v. Mason County Drain Commission, 393 Mich. 294 (1975). And it gives citizens standing to enforce the Act.

Under MEPA, defendants may prevail, even if their activity causes "pollution, impairment, or destruction. ." to the environment, by proving as an affirmative defense that they have "no feasible and prudent alternatives." (Mich. Stat. Ann. 14.528 (203(1)). In this case, the defendants did not plead the defense, and then specifically disavowed it early in the proceedings. (R 812).[3] Thus the case turned on competing interpretations of the operative phrase, "pollution, impairment, or destruction." (Mich. Stat. Ann., Sec. 14.528 (201). Plaintiffs argued that noise pollution, wildlife impairment, recreational resource destruction, oil spills, and forest destruction plainly met the Act's threshold requirement of environmental damage. The defendants claimed that the adverse impacts were neither severe enough or long lasting enough to constitute "pollution, impairment or destruction" under MEPA. It was argued by the defendants, for example, that the Act would not be violated since trees would grow back once oil development was finished (R 1230); that the elk herd, though diminished, would not be entirely wiped out (R 1229 R 1230); that noise would only last for the years during which drilling continued (R 1229); and oil spills would be too infrequent and too small to be significant (R 1222 R 1229).[4]

Though the trial court agreed with the defendant's interpretation of MEPA, the Michigan Supreme Court unanimously disagreed and held that the level of damage proven clearly met the

[3] Petitioners' explanation for the failure to offer evidence on the affirmative defense at Footnote 11 is misleading. Plaintiffs offered evidence that the Defendants had alternatives and that the agency had exaggerated the anticipated amount of oil under forest. Defendants/Petitioners' object to the evidence on the grounds that it was relevant only to the affirmative defense, which the Defendants had not pled. The judge sustained the objections saying:

> ". . . . The Defendants haven't offered any [affirmative] defense. . . . It's not pled, it's not pled as a defense, and it's not to be presented now, inquired into by you or the Defendants later. So they are forewarned not to bother with it, not to take up the court's time with it. The lawsuit here is on the basis that they are not going to cause any pollution. That's what they rise and fall on. So I'll sustain the objection." (R 812.)

[4] c.f. Footnote 9, infra. The Petitioners' argument presented to the Michigan Supreme Court centered on this same issue, as illustrated by the Index to their Brief before the Michigan Supreme Court, set forth in Respondents' Appendix at 1a - 3a

statutory requirement (A 13a-14a, 18a-19a). Since the defendants failed to plead the affirmative defense, the Court held that a violation of the Act had been proven, and sent the case back to the trial court for entry of an injunction. (A 14a)

REASONS FOR DENYING THE WRIT

1. The question whether the environmental effects of proposed drilling activities violated MEPA, the issue on which the Supreme Court of Michigan disposed of this case below, was fully and fairly litigated in the trial court below. The trial court allowed the parties "full latitude in rebutting every factual issue" in the case, Hamling v. U.S., 418 U.S. 87,110 (1974). As a result the trial lasted eight weeks, the transcript is over 4,000 pages long, and more than fifty admitted exhibits add several thousand pages to the record. As to some environmental effects (e.g. oil spills) the petitioners submitted their own expert testimony.[5] As to others (e.g. noise, trees, wildlife) they made a strategic decision to rely on rebuttal testimony from state-defendant's witnesses, combined with cross examination and argument. Defendant-petitioner's claim that they were unaware the impacts of oil drilling were in issue is unequivocally refuted by the record.[6]

[5] The Petitioners' expert testified to the likelihood of water pollution from oil spills. In Footnote 6 of the Petition, Petitioners attempt to explain his testimony as part of the findings of the Commission in its EIS. It is theoretically impossible to view the report about which he testified as part of the Commission's "determination", or "findings", for the environmental impact statement was prepared in 1975, and adopted as part of the Consent Order in 1976. The oil spill report was not even prepared until 1977, after this lawsuit was filed. The testimony was relevant solely to the substantive question of "pollution, impairment, or destruction", illustrating that the substantive issue was joined.

[6] The sequence of events in rulings at trial is set forth more fully in Respondents'/Plaintiffs' brief in answer to the Motion for Re-Hearing, which is set for in Respondents' Appendix at 4a-15a. The key phrase cited by Petitioners in Footnote 5, the proposition that the trial court ruled only procedural matters were at issue, is taken out of context. The entire paragraph, set forth in Appellants' Appendix, cited the Judge holding just the opposite, viz, that the Complaint raises a MEPA complaint which empowered him to review the findings, make his own adjudication of the facts, and issue an injunction if, " pollution, impairment, or destruction or destruction" were threatened. (8a-9a)

2. After the trial court dismissed certain counts of the complaint, and before petitioners put in their case, petitioners moved to dismiss the paragraph from the complaint in which an injuction was sought. Their argument was precisely the same one they submit to this Court: Only procedural issues remained, based upon which no injunction could issue. The judge denied the motion, explaining that the remaining MEPA count required more than a mere examination of procedures.[7]

> The court shall further adjudicate the impact of defendants' conduct on the air, water, and other natural resources, may order that additional evidence be taken to the extent necessary to protect the rights recognized in the Act, so on and so forth . . . . . By virtue of the Act, it seems to me from the evidence I could issue injunctive relief as to some permits and not as to others, I could issue injunctive relief as to all of them, or none of them. R 1079-R 1080.

In other words, under MEPA, the remaining paragraphs of the complaint placed the substantive issue, whether the activity of oil drilling violated the Act, squarely before the trial court. And the trial court so advised the petitioners.[8] This fact explains why the state responded with two rebuttal witnesses who testified that drilling effects were not as devastating as claimed by the plaintiffs (R 1084- R 1147), why the petitioners presented an expert who testified for two days concerning the effects of potential oil spills, why the trial judge made extensive findings of fact (R 1243-R 1256), why the parties argued these findings in the Michigan Supreme Court (Respondents Appendix, 1a - 15a), and why that court determined that the matter had been fully and fairly litigated (A 5a, A 44a).

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[7] Id.

[8] Defendants objected to cross examination of their witness on substantive issues on the basis that "the only thing that the Complaint says is that the Consent Order was issued without findings." (T 3706.) The trial judge overruled the objection:

> "Well, the court has held that the Michigan Environmental Protection Act is still part of this lawsuit and there is a prima. There was a prima facie showing of pollution by the witnesses that Mr. Conner presented. The court has made time available to the Defendants to rebut that presumption, which I assume is what we are engaged in doing." (T 3707.)

3. The suggestion that plaintiffs' attempt to amend their complaint somehow indicates that petitioners did not know what facts were in issue is little short of incredible. The question whether the complaint should have been amended arose as a result of petitioner's tactical decision to try to win the case on a technicality. Since the lawsuit was filed after an Administrative Order consenting to the drilling was issued, but before permits were granted, petitioners argued doggedly that the case was not "ripe"—and in that sense, no actual drilling was yet threatened or in issue. The trial court agreed, and remanded for further administrative proceedings. After permits were granted, plaintiffs returned to court, now to be told by petitioners that since the complaint attacked only the "Consent Order", not the permits, no testimony at all concerning oil drilling was admissible. Plaintiffs countered that it was the effects of drilling activities, fairly framed by the complaint under state law, which concerned them, not the procedures by which permits were issued. The trial court considered the issue joined, and the Michigan Supreme Court agreed. It is noteworthy that the state-defendants never doubted that the oil drilling was in issue.[9]

CONCLUSION

The Constitution does not permit parties to relitigate issues simply to retrieve tactical errors made in the original trial. Petitioners' attempt to turn a case involving state law questions into an issue of procedural due process by claiming "surprise" finds support nowhere in the record and is wholly at odds with the assumptions of the state defendant, the plaintiff, the trial court and the Michigan Supreme Court. The petition should be denied.

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[9] In their Brief to the Michigan Supreme Court, at 15, the State Defendants characterized the issues before the trial court as follows:

> "The issure as framed in the trial court was predicated upon the State's specifically denying that pollution, impairment, or destruction was likely to occur, while still acknowledging that some adverse impacts from the project were unavoidable."

APPENDIX

TITLE:

Excerpt – Table of Contents from Brief on Appeal to the Michigan Supreme Court of Appellee, Shell Oil.

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Brief of
West Michigan Environmental Action Council et al.,
in response to the Motion of Shell Oil, et al.,
for rehearing in the Michigan Supreme Court

STATE OF MICHIGAN

IN THE

SUPREME COURT

West Michigan Environmental Action Council, Inc., Pigeon River Country Association, Northland Sportsman's Club, Detroit Audubon Society, Inc., Michigan Council of Trout Unlimited, Inc., Michigan Student Environmental Foundation Inc., East Michigan Environmental Action Council, Inc., Michigan Lakes and Streams Association, Inc., Sierra Club, Inc.,

Plaintiffs-Appellants,

v

Natural Resources Commission of the State of Michigan, and Howard Tanner as Director of the Department of Natural Resources of Michigan,

Defendants-Appellees, and

Shell Oil Company, a Delaware corporation, Amoco Production Company, a Delaware corporation, and Northern Michigan Exploration Company, a Michigan corporation,

Intervening
Defendants/Appellees.

Ingham County
Circuit Court
Case No.
76-19335-CE

Court of Appeals
No. 77-4777

Supreme Court
Case No. 60800

Plaintiffs—Appellants
Answer to Motion for Rehearing

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ANSWER TO APPLICATION FOR REHEARING

I

Answering paragraph I of the Application for Rehearing, Plaintiffs deny that the rendering of the final decision in the case precluded Intervening Defendants Appellees from having an opportunity to present their case. Plaintiffs assert that they had full and complete opportunity to do so and they either presented the best evidence they had or they intentionally chose to withhold evidence and they should be bound by such decision.

II

Answering paragraph II of the Application for Rehearing, Plaintiffs deny that Intervening Defendants Appellees were denied an opportunity to present evidence, alleging that the record is clear and unassailable that they had such right in the Trial Court.

III

Answering paragraph III of the Application for Rehearing, Plaintiffs deny the allegation contained therein.

IV

Answering paragraph IV of the Application for Rehearing, Plaintiffs deny that the Intervening Defendants Appelles were deprived of an apportunity to present their defense on all issues raised under the Michigan Environmental Protection Act.

V

Answering paragraph V of the Application for Rehearing, Plaintiffs deny that the Michigan Environmental Protection Act is unconstitutional as applied to this case.

ARGUMENT

The Intervening Defendants Appellees essentially argue that the case should be remanded for futher testimony. They seek to create the impression that they "relied upon a specific ruling by the Court" when they declined to submit evidence of lack of environmental damage from the drilling. The thrust of their position is that the dismissal by the trial court of certain portions of the Complaint at the close of Plaintiffs proofs not only misled them into a belief that the effects of drilling were not in issue, but that they were precluded by those rulings from submitting evidence on the lack of adverse environmental effects of drilling. They lament what they consider to be "a procedural nightmare". The truth is that if a nightmare existed, they created it themselves.

The record discloses that the Intervening Defendants Appellees made a mature, knowing and intentional tactical decision on how they would presnet their case. They knew full well that the Michigan Environmental Protection Act was the central issue of the lawsuit notwithstanding the dismissal of portions of the Complaint. They knew that the Court had ruled that there was a prima facie showing of pollution, impairment or destruction by the witnesses that the Plaintiffs presented. The Court afforded the Intervening Defendants Appellees full opportunity to rebut that presumption and to submit evidence in that regard. The Intervening Defedants Appellees made a knowing, conscious and intentional decision to rely on the State's witnesses and exhibits supplemented by the testimony of their expert witness namely Dean O. Gregg. They are bound by that decision just as much as they are bound by their decision not to plead or submit proofs on the affirmative defense.

Intervening Defendants Appellees make much of the fact that the Trial Court dismissed various paragraphs of the Complaint, including paragraph 15 which contains references to specific types of pollution, impairment or destruction to the environment. They assert that by this ruling "the Trial Cour ruled that the issues regarding impairment to elk or other natural resources ment. They assert that by this ruling "the Trial Court ruled that

Intervening Defendants Appellees make much of the fact that the Trial Court dismissed various paragraphs of the Complaint, including paragraph 15 which contains references to specific types of pollution, impairment or destruction to the environment. They assert that by this ruling "the Trial Court ruled that the issues regarding impairment to elk or other natural resources were no longer before the Court". (Br, 8) The sequence of events at trial demonstrates that the Court made exactly the opposite ruling, that it repeatedly reminded the Intervening Defendants Appellees that the "issues regarding impairment. . . . . were. . . before the Court", and that Defendants understood that MEPA was still at issue.

Shortly after ruling on the dismissal of paragraph 15 on November 17, 1978, the Court commented on the issues remaining under the MEPA in dismissing Count III (the Oil and Gas Act): (A 1060-1061) [Tr. pp 3143-3144]

> THE COURT: Now as I stated, I have had considerable difficulty with this particular Count since the Court felt there was a reliable and substantial evidence before the Court setting forth at least a prima facie case that the Plaintiffs were correct that pollution, impairment or destruction or unnecessary waste or destruction was eminent, and I think I stated that again this morning in refusing to strike testimony of the three witnesses involved in that assertion. But I guess a further view of the Oil and Gas Act in and of itself is a useless exercise.
>
> * * * *
>
> On the basis of all of that, I don't believe that the Court should continue a consideration of this Count. Certainly before us yet is the application of the Environmental Protection Act which seems to amply serve the Plaintiffs in their continued presentation of their case and the Court's view of the entire situation, and I think that we are unnecessarily detracting from the true pursuit here by a further reference to any application of the Oil and Gas Act. (Emphasis supplied)

On Monday, November 21, 1977, the Trial Court, upon the motion of the Defendants dismissed further portions of the Complaint. The Court then explained the remaining issues again: (A 1070) [Tr. p 3161]

> THE COURT: Now, the State and the Intervenors have indicated that the State did make this determination, they did determine the alleged pollution, impairment or destruction, and it's contended by the Plaintiffs that their determination clearly shows that pollution, impairment or destruction will occur. I'm not prepared to agree with them yet, because I haven't heard all the evidence. I heard what the Plaintiffs have presented, and the Court has not stricken as counsel is aware that evidence, and the Court believes that paragraph 16 correctly states the law as I understand it to be. I don't believe that there is anything further I need to say in regard to the paragraph other than that, so I'm going to deny the motion to strike paragraph 16 on the basis just indicated. (Emphasis supplied)

Intervening Defendants Appellees then tried once more to press upon the Trial Court the very argument they have made to this Court – that given the dismissal of various paragraphs, the "issues regarding impairment to elk or other natural resources were no longer before the Court". (Br, 8) This variation on the theme took the form of a motion to dismiss the prayer for injunctive relief. Once again, the Court painstakingly explained his ruling, and surely eliminated any doubt that "issues regarding impairment" (Br, 8) were still before the Court: (A 1079-1080) [Tr. pp 3181-3182]

> THE COURT: The Environmental Protection Act does grant the Court the power to grant temporary and permanent equitable relief, further imposes upon the Court the power to impose conditions on the Defendant that are required to protect the air, water, and other natural resources. The Court shall further adjudicate the impact of the Defendants' conduct on the air, water, and other natural resources, may order that additional evidence be taken to the extent necessary to protect the rights recognized in the Act, so on and so forth.

> So the fact that the permits are not before me doesn't seem to me to prevent the Court from reacting to the proofs that the Consent Order was improperly entered into by virtue of the findings surrounding it, and that therefore activities taken pursuant to it would be inappropriate for one to go forward with it. It seems to me I could find 100 different things. By virtue of the Act, it seems to me from the evidence I could issue injunctive relief as to some permits and not as to others, I could issue injunctive relief as to all of them, or none of them, I could impose conditions not imposed by the Consent Order in order to fulfill the conditions of an injunction otherwise. The Court, it seems to me, could order that one well instead of two be drilled at once, or that one clearing be done at a time, that roads not be as wide as imposed, we could take additional evidence regarding that, I could think of a thousand things that the Court might do by way of injunctive relief if it found that it was insecure in the State's promulgation of the Consent Order.
>
> So I think I'm going to leave the prayer for relief like it is with the understanding that we're only here – we're only here at this point on a request for permanent injunction as to matters set forth in paragraphs A and – well, B, really isn't – really isn't here, the matters set forth in paragraph A.

Following such ruling and at the close of that day (Monday, November 21, 1977) Intervening Defendants Appellees were under no illusion that they could avoid responding to the Plantiffs' principal case. The closing colloquy that day included the following comments: [Tr. pp 3222-3223]

> MR. SMITH: Judge, I would just like to make a request. In light – and I am trying to judge and balance where we might get left in terms of bringing our proofs in and bringing witnesses in. I wonder if I can assume I don't need to bring people in from out of town to have them here tomorrow.
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> THE COURT: Mr. Freeman indicates he is going to take tomorrow, and Wednesday is motion day, so the next Court day will be Monday.
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> MR. SMITH: I don't want to get caught at 4 o'clock and have you say "Go". We could be subject to a rather substantial burden and expense.

MR. FREEMAN: I think it's a fair guess, Your Honor, we will take all day. I would be delighted to take Mr. Smith out to a Martini if we finish early.

MR. CONNER: I will pay.

THE COURT: Mr. Conner will pay.

MR. SMITH: That's the first decent offer we have had in this lawsuit.

THE COURT: All Right. We stand adjourned until tomorrow morning, 9:30.

The Trial did resume the next day, Tuesday, November 22, 1977, with the Natural Resource Commission witnesses'. Prior to adjourning that afternoon for the Thanksgiving holiday, the following colloquy occurred: [Tr. pp 3402-3403]

MR. CONNER: Before we adjourn, Your Honor, I would like Mr. Smith to give some indication of the number and order of the witnesses he intends to call.

He gave us along list of potential witnesses which would be difficult or impossible to prepare, and we have been attempting – and I would like to express on the record that Mr. Smith has made an effort to make Mr. Gregg available to us and because of problems that were as much associated with my own schedule as Mr. Gregg's schedule –

MR. SMITH: And my schedule.

MR. CONNER: And Mr. Smith's schedule, we haven't been able to arrange that. So in order to see exactly what we are going to deal with, we would like to know the number and order of witnesses that Mr. Smith intends to call so we can prepare.

THE COURT: Well, of course, I am not going to direct him to indicate that, but if you can, why, fine.

MR. SMITH: Quite frankly, I want to sit down and rereview everything and reanalyze everything in terms of just what it is we are left with in the Complaint, and the impact of the proofs that have been offered by the State, so I am not prepared to make any binding statement. I have advised Mr. Conner that it is my present intention to call Mr. Gregg certainly as one witness, and I am endeavoring to find out precisely what his availability is between now and the time I would call him, so I can let Mr. Conner know, and I expect I will be in a position to advise the Court further as to precisely where we are going and how long it is going to take after I have had a chance to reanalyze, as I have indicated.

THE COURT: Okay. Do you know which individual will be your first witness, or don't you?

MR. SMITH: I really don't know for certain. I hope to know tomorrow; and when I make the determination, I am not trying to keep it a secret. I will be happy to let you know. (Emphasis supplied)

The trial resumed after Thanksgiving on Tuesday, November 29, 1977. The Intervening Defendants Appellees waived their opening statement and called their only witness, Dean O. Gregg, who testified on Tuesday, November 29, 1977 and Wednesday, November 30, 1977.

On Wednesday, November 30, 1977 during the cross examination of witness Gregg the Court made the following ruling: [Tr. pp 3706-3708]

MR. SMITH: Your Honor, I would like to make our position clear on this. First of all, if you can't receive the testimony as to the State, then I don't think you can receive it as to us, based upon the Complaint. Now, if Mr. Conner realizes a point and says I don't know what my brother counsel assumes and he thinks somehow the rulings that you have made in regard to various motions to strike illustrate what was tried here, well, I would have to admit to the Court that I have been somewhat mystified by where people are going, but I haven't assumed anything and I'm relying upon the Complaint and the only thing that the Complaint says is that the Consent Order was entered without findings. It doesn't say that findings were made and they were inadequate, it doesn't say anything that says this Court should make a determination under MEPA. Those allegations simply aren't there. So I object to the question, and further, I object to any attempt if Mr. Conner, in the eighth week of Trial, is now trying to amend his Complaint, I most strenuously object.

THE COURT: Well, the Court has held that the Michigan Environmental Protection Act is still part of this lawsuit and that there is a prima – there was a prima facie showing of pollution by the witnesses that Mr. Conner presented. The Court has made time available to the Defendants to rebut that presumption, which I assume is what we are engaged in doing. **** (Emphasis supplied)

The Intervening Defendants Appellees ordered daily trial transcripts prepared during the trial. At the opening of Court on Thursday, December 1, 1977, they quoted from a portion of the previous day's (November 30, 1977) transcript in connection with a motion for preliminary injunction by Plaintiff. [Tr. p 3751] Thus, they cannot be heard to say that the clear, unequivocal and straight forward statement of the Trial Court quoted above had somehow eluded them. They had the transcript in their hand, in court the very next day. Notwithstanding the Court's ruling, they nevertheless declined to offer witnesses other then Mr. Gregg and rested their case on December 1, 1977.

The Trial Court told the Intervening Defendants Appellees that MEPA was the issue in the case, invited them to submit evidence in oppositon to the prima facie case of the Plaintiff, and provided them with opportunity and time to do so. Yet they knowingly and deliberately insisted on proceeding with the tactical decision which they obviously had made over the Thanksgiving holiday to limit their proofs to the testimony of witness Gregg. It is incredible indeed that they now claim that they were misled into limiting their proofs by the dismissal of a portion of the Complaint, when they had daily transcripts of the proceedings, studied those transcripts, were present in Court and heard the trial judge, and knew full well what issues they were called upon to try in the case.

The Court should ask this further question; If, as Intervening Defendants Appellees now contend, they believed that "issues regarding elk and other natural resources were no longer before the Court" (Br, 8), why did they submit witness Dean Gregg? Why did they have him give detailed testimony for two days about the likelihood of contamination from oil spills, (see e.g., A 1151 et seq) when the only specific reference to oil spills in the Complaint was paragraph 15?

The only consistent interpretation of the Intervening Defendants' Appellees actions was that they recognized, as the opinion of the Court observed, that "the Trial Court chose to address the issue of the likelihood of pollution . . ." (Op, 5). As to some of these they presented independent testimony (e.g. spills); as to some they relied on the state witnesses; and on others to cross exmaination and argument. Their full understanding that all MEPA issues including "elk" where before the Court is underscored by the final argument of their counsel. (A 1228-1230) [Tr. pp 3917-3919]

> MR. SMITH: The Plantiffs have failed to establish that an oil spill is likely as required by the Environmental Protection Act. Even if, however, and you're taking the worst upon the worst upon the worst, even if the Plaintiffs are totally silent in terms of the clean-up processes set forth in the contingency plan, Shell Exhibit No. 1 and Plaintiffs' Exhibit No. 32, the Dames and Moore report, and then taking another worst upon a worst or a possible on a possible on a possible, they say, "If some quantity might reach the surface water, that somehow that might lead to pollution, impairment or destruction." There's no showing of any quantity or that there would be any quantity that would be sufficient to cause that. Indeed, Your Honor, they have the obligation to show that the Defendants' conduct has or is likely to pollute, impair or destroy, and I submit they haven't done that.
>
> The Environmental Impact Statement contemplated certain impacts that would occur, and they're set forth. No one has tried to hide it; no one has tried to alter it. The biggest share of the impacts go to recreational activities, clearly not air, water or natural resources, particularly in terms of noise, that doesn't go to air, water or natural resources. There's not one bit of proof on this record where one could be persuaded to find that indeed the noise they are talking about had any effect upon the air or upon the water or upon natural resources. There is a link in the chain that was never connected up, Your Honor.
>
> And in terms of any impact on wildlife, what they're really saying is that the elk may move and not be in a particular area, but they just don't seem to want to point out to you that there is hunting of bear and bobcat, as an example, that keeps them from going to a particular area; but that's not pollution, impairment or destruction, Your Honor. Dr. Inman testified that you've got to look at the whole picture, timber harvesting has a tremendous impact upon a particular tree, it has an impact upon the bird that lives in the tree, it has an impact upon any other animal that happens to be impacted by that particular area. But the fact they harvest timber certainly doesn't mean you have polluted, impaired or destroyed. (Emphasis supplied)

The assertion by Intervening Defendants Appellees that they were somehow denied due process of law when the Supreme Court rendered its final decision in the case is truly beyond

belief. They argued, based on testimony from the State's witnesses, there was no impairment to elk, bear or bobcat - but they did not offer their own evidence of that fact at the trial. The Intervening Defendants Appellees now seek to shift the blame for the results of their tactical trial decision upon the Plaintiffs. A lawsuit is not gamesmanship, it is an opportunity to present in an orderly manner the parties' contending positions. The Intervening Defendants Appellees now assert that they have evidence that they did not offer to the Trial Court. If, in fact, that is the case, (which we doubt) they are as bound by their action as they are by their decision not to plead the affirmative defense. They should not be allowed to "sand-bag" this Court or the Plaintiffs. The Intervening Defendants Appellees are brillant, knowledgable and successful businesses. Their own suggestion that they didn't know what they were doing at the trial is fatuous.

This Court's observation that "The effects of these permits were comprehensively treated at the trial level, both by the parties and by the circuit judge." (Op, 5) is surely an understatement. Rarely have Defendants entered a lawsuit more aware of the arguments they would face, for the issue of oil development in the Pigeon River Country has been before the public, courts and agencies for a decade. The trial was one of the longest in the history of the Ingham County Circuit Court. The transcript stretches to more than 4,000 pages. The parties entered almost a hundred additional exhibits. In short, the Defendants had their day in court, both literally and figuratively.

Litigation of this type must stop somewhere. To remand and allow Intervening Defendants Appellees to present further evidence which they now claim they withheld from the Trial Court would be unjust, an unconscionable burden on Plaintiffs and run contrary to the basic principals of our judicial system. The decision was fair, and Intervening Defendants Appellees have offered no good reason to reverse it.

The Intervening Defendants Appellees further argue that a de novo review under the Michigan Environmental Protection Act is contrary to the provisions of the constitution of the State of Michigan. The constitutionality of the Michigan Environmental Protection Act has been carefully scrutinized by this Court in State Highway Commission v VanderKloot, 392 Mich 159 (1974) and Ray v Mason County Drain Commissioner, 393 Mich 294 (1975). See also: The Constitutional Question: Vagueness and Delegation of Powers, 4 Journal of Law Reform 397 (1970). Based on these authorities there is no merit in the Inter-

vening Defendatns Appellees' claim that the Michigan Environmental Protection Act (MCLA 691.1201 et seq, MSA 14.528 (201) et seq) is unconstitutional.

RELIEF

Plaintiffs respectfully pray for the entry of an Order Denying Motion for Rehearing.

Respectfully Submitted,

Roger L. Conner
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